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No. 936

Office-Supreme Court, U.
FILED
JUN 7 1960
JAMES R. BROWNING, C

In the Supreme Court of the United States

OCTOBER TERM, 1959

THE RASER TANNING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 8(a)(1)	5, 6
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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 34) is reported at 276 F. 2d 80. The Board's Decision and Order (267a-273a)[1] are reported at 122 NLRB 640.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1960 (Pet. 41). The petition for a writ of certiorari was filed on May 13, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] References followed by the letter "a" are to the appendix to petitioner's brief in the court below; references followed by "b" are to the appendix to the Board's brief below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that petitioner, in order to defeat a union campaign, engaged in surveillance, interrogation, threats, and promises of benefit, and that it discharged seven employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

2. Whether there were procedural irregularities in the Board proceedings.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-4 of the Petition.

STATEMENT

A. *The Board's Findings of Fact*

In the course of its organizational campaign in April of 1957, the Union [2] held two meetings in a church to which many of petitioner's employees belonged (253a; 16a-17a, 6b, 84a). Petitioner learned of the union activity the day after the first meeting (183a-184a). Its president, vice-president, superintendent, and secretary thereupon compiled a list of employees they expected would support the Union; and, as the secretary admitted, they "started by putting down all the colored fellows * * * because of the activity they were having at the * * * church" (184a).

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[2] Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.

The employees who came to the second union meeting saw a car drive slowly back and forth in front of the church. Inside the car were petitioner's vice-president, superintendent, and secretary, who made notes, apparently of license plate numbers, as they passed the parked cars of their employees. The following morning, the same company officials were seen in the employees' parking lot, checking the backs of the cars against a piece of paper they were carrying (254a; 6b-8b, 10b-18b, 27b-28b, 38b, 46b-47b, 60b-61b).

Later that same morning, petitioner's vice-president remarked to one of the employees, "I see you were late for the union meeting" (254a; 15b). Petitioner's superintendent asked another employee, Kenneth Barlow, whether he had been at the union meeting. Upon receiving an affirmative reply, he remarked, "We knew that you were because we have your license number," and showed Barlow a list of license numbers, pointing out his and his brother Jack's (253a; 28b).

About a week later, shortly before the Board conducted a representation election at the plant, petitioner's superintendent told Kenneth Barlow that the Company would do all in its power to keep the Union out, and, if the Union did succeed, employees who had had anything to do with it would be sorry (255a; 29b). A few days later, Barlow told the superintendent that he was "finished with the Union" (255a; 25b, 30b).

Barlow was then asked to repeat his recantation in the presence of petitioner's president, vice-president, and secretary (255a; 30b). Petitioner's president told Barlow that anyone could make a mistake and that he would forget it if Barlow were really through with

the Union, and that Barlow would get a higher paying job after the election if the Union lost (255a; 30b). Thereafter, Barlow, on the request of petitioner's superintendent, telephoned him when the next union meeting was to be held at the church. Although petitioner's vice-president and superintendent found no meeting there at the appointed time, the superintendent, on the instructions of petitioner's president, gave Barlow a dollar "for the phone call" (255a; 55a-57a).

A third union meeting was held at the Steelworkers' Hall on April 30, the night before the representation election (253a-254a; 22b, 29b). On the following morning, petitioner's superintendent asked Kenneth Barlow if he had attended this union meeting in spite of his earlier declaration that he was "finished with the Union." Barlow denied that he had attended, and the superintendent showed him a list, stating, "Well, we have a list of names here of the guys that were at the union meeting last night. Your name and Jim Trent's is on the top * * *" (254a; 31b).

When Barlow asked how they knew who was at the meeting, the superintendent replied, "We had several of the boys up there" (254a; 31b). He told Barlow that the only way to make his job secure would be to abstain from voting in the representation election that day (256a; 31b). Immediately preceding the election, Kenneth Barlow's brother, Jack, was asked by a foreman whether he was as strong for the Union as his brother. When Jack answered in the affirmative, the foreman said, "Well, that's too bad" (262a; 34b-36b, 39b-42b).

Both Barlows voted, despite these warnings, and a week after the election they were summarily and simultaneously assigned to work at the Hide House, where petitioner sent employees for disciplinary purposes because the work there was the most disagreeable and the pay the lowest (259a; 2b, 34b, 51a-52a, 172a-174a, 54b, 57b, 63b). The next day, petitioner's superintendent told them to pick up their checks because they were being laid off (262a; 34b-36b, 39b-42b).

Some months later, when Jack Barlow reapplied for work, petitioner's superintendent told him that he would not be hired because of "the way your brother carried on with the union" (262a; 43b-44b). The superintendent then asked Jack whether he had voted for the Union, and, when Barlow replied that he had and would do so again, he was told that he would not get the chance "because they won't hire you back" (262a; 44b).

In addition to the Barlow brothers, petitioner discharged five other employees. Like the Barlows, they were active union adherents who, prior to their discharge, had records of several years of steady and satisfactory service at petitioner's plant. And, as with the Barlows, the circumstances of their discharges made it plain that the reason was their union activity (256a, 257a, 259a, 260a, 270a; 16a-17a, 84a, 3b-5b, 10b, 20b, 25b, 45b-46b, 47b, 49b, 53b).

B. *The Board's Conclusions and Order*

On the basis of this evidence, the Board found that petitioner violated Section 8(a)(1) by its surveillance of union meetings, and by the interrogation, threats,

and promises of benefit addressed to employee Kenneth Barlow and others (254a, 256a, 268a). The Board further found that petitioner violated Section 8(a)(3) and (1) by its discharge of the seven employees in question (263a, 268a, 270a).

The Board's order requires petitioner to cease and desist from violating Section 8(a)(1) and (3), to reinstate with back pay the seven dischargees, and to post appropriate notices (270a-272a).

C. *The Decision of the Court of Appeals*

The court below upheld the Board's unfair labor practice findings as adequately supported by the record and found no irregularities in the Board's procedure. It accordingly enforced the Board's order in full (Pet. 41).

ARGUMENT

1. Petitioner's substantive contention is that the Board "has failed to sustain its burden of showing violations of the Act by substantial evidence" (Pet. 22). The court below, after noting that the "Trial Examiner in his findings carefully reviewed the testimony," concluded that "there is evidence of a substantial nature to support his findings which were adopted by the Board" (Pet. 40). In these circumstances, no issue warranting further review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts summarized in the Statement demonstrate that there is ample support for the Board's unfair labor practice findings. Petitioner's contrary contention appears to rest principally upon alleged er-

rors in the Trial Examiner's determinations as to credibility (Pet. 24-25). These determinations, made by the "experienced examiner who has observed the witnesses and lived with the case" (*Universal Camera Corp.*, 340 U.S. at 496), will not be disturbed on review in the absence of a showing of gross error. No such showing can be made in this case.

2. Equally insubstantial is petitioner's further contention that it was denied a fair hearing because the Trial Examiner demonstrated "bias and open hostility" (Pet. 13). As the court below concluded (Pet. 40):

> Our examination of the record does not disclose any prejudicial bias or hostility on the part of the Trial Examiner. He was courteous to the lawyers, impartial in his rulings and carefully excluded impertinent testimony. He gave counsel for the petitioner ample opportunity to present his case and we cannot say that he denied the petitioner the right to introduce any competent evidence.

This conclusion is not impaired by the three incidents referred to by petitioner (Pet. 16-21), on their face they fall far short of establishing bias. Cf. *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44. Nor is prejudice in this case established by what the same Examiner may have done in some other cases. And even if, as petitioner charges, the Examiner had " 'uniformly credited the Board's witnesses and as uniformly discredited those of * * * [petitioner] * * * [this] would not furnish a basis for a finding * * * [of] bias or partiality * * * ' " *National Labor Relations Board* v. *Pitts-*

burgh Steamship Co., 337 U.S. 656, 659-660, quoting from *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800 (C.A. 5).

3. Finally, there is no substance to petitioner's contention that it was improperly denied the right to inspect the prehearing statements of the General Counsel's witnesses (Pet. 10-12). Only two witnesses testified to having made prehearing statements to the General Counsel (Pet. 36); and, as the court below found, the failure of company counsel to move, after they so testified, for the production of these statements "waived any right or privilege he may have had for their inspection" (Pet. 38). Nor can such a request be deemed to have been made by the subpenas which petitioner requested at the outset of the hearing calling for "all statements, affidavits and other written matter developed by or received by the Charging Union or the General Counsel with respect to all items of the Complaint and all of the material during the investigation leading up to the issuance of the Complaint" (Pet. 35). These subpenas were properly quashed by the Examiner, for, as the court below observed (Pet. 35), "The request is so broad that it is meaningless." In any event, the failure of petitioner to raise the issue of the prehearing statements in its exceptions to the Examiner's report [3] precludes it from arguing the point now.

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[3] Petitioner's failure to file exceptions on this point is not excused by the fact that the Board was then of the view that the *Jencks* rule did not apply to Board proceedings. The Board's decision in *Ra-Rich Mfg. Corp.*, 121 NLRB 700, reversing this position, was issued several months before the decision herein. Moreover, when it filed exceptions, petitioner was already on notice that the Second Circuit, in *National Labor Relations Board* v. *Adhesive*

Section 10(e) of the Act; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June, 1960.

Products Corp., 258 F. 2d 403, had held that the *Jencks* rule applied to Board proceedings. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37; *National Labor Relations Board* v. *Pinkerton's National Detective Agency*, 202 F. 2d 230, 233 (C.A. 9).

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